from the recorded medical notes to the effect that the respondent developed ischaemic changes in his right foot it was highly likely that such changes occurred as a result of arrest of the blood flow to the forefoot due to sudden occlusion of the artery supplying blood or total severance of the vessel. Gangrene ensued following arrest of blood supply resulting in death of the forefoot which has sequestrated from the limb leaving behind an uneven grotesque stump replacing normal foot. It was his view that functionally the irregular stump served no purpose. A well-planned amputation of his right leg followed by the fitting of an artificial leg would enable him to lead a normal healthy life.

It is the appellant's contention that if the respondent had not left the hospital against medical advice and if he had the leg amputated and fitted with an artificial leg there would then be no future loss. The respondent, however, contended that even if the respondent had his leg amputated it is doubtful he could get $150 p.m. and assuming he could, the loss would still be around $450 p.m. and given 27 years' purchase he should be awarded a sum of $79,072.38 future loss of earnings.

The law is clear in that as enunciated by Viscount Haldane L.C. in *British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London, Limited* (House of Lords)[1]

"The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."

Thus the onus falls upon the respondent to take all reasonable steps to mitigate the amount of damage. It is evident that the respondent acted unreasonably when he left the hospital against medical advice. If he had remained in the hospital to continue with the treatment even if it should become necessary to have the leg amputated, it was clear that he would be able to lead a normal healthy life.

With respect the learned judge did not state whether he gave any, if at all, consideration to this factor in his assessment of damages for future loss of earnings. There was no definite evidence that the respondent would lose $300 p.m. On the contrary there was evidence that the respondent was only earning about $200 p.m. at the date of the accident. Even assuming his income would increase under the present day market the amount of damages for his future loss of earnings must nevertheless be viewed in the light of the fact that if he had submitted to proper medical treatment (fitted with artificial leg, if necessary) he would be able to lead a normal life and with his level of education he could still work and earn some income.

We form the view that it was erroneous to assess the loss of future earnings without considering this duty of the respondent to mitigate the damage. The error is one of principle and it is therefore open for this court to interfere.

There is no reason to doubt that the respondent would suffer loss in his future earnings, but for reasons stated above his future loss, even if it is assessed on the basis of an enhanced monthly earnings, should not in the absence of definite evidence be more than his earnings at the date of the accident.

We are of the view that on a sum of $150 p.m. given the number of years' purchase decided by the learned judge, the proper award for loss of future earnings should be a sum of $21,000. We therefore allow this appeal and vary the award accordingly.

Appeal allowed.

Solicitors: *David Alfred & Co.; Shearn Delamore & Co.*

KANAGASABAI SATKURU v. UNITED MALAYAN BANKING CORPORATION BHD.

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.) February 16, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 45 of 1980]

Practice and Procedure — Claim on overdraft account — Shares deposited as security — Shares sold to settle account — Whether bank was bailee or pawnee of shares — Issue not raised in pleadings.

Banking — Overdraft account — Shares deposited as security — Shares sold to settle account — Whether bank was bailee or pawnee of shares.

Contract — Shares deposited with bank to secure overdraft — Whether bank bailee or pawnee of shares — Contracts Act, 1950, ss. 125-129.

In this case the appellant bought and sold shares using overdraft facilities on the security of the shares deposited with the respondent bank. The stock market crashed and the respondent demanded payment of the overdraft. Eventually the respondent sold the shares for $46,945.20 leaving a balance of $13,174.59 on the overdraft account. The High Court gave judgment for this sum against the appellant. The appellant appealed and on the appeal it was argued *inter alia* that the respondent bank was a bailee or pawnee of the shares and was under a duty to ensure that the sale of shares was a provident one.

Held, dismissing the appeal: the question raised by the appellant was not alleged in the pleadings. The learned trial judge properly decided the case on the issues disclosed by the pleadings.

Cases referred to:-

(1) *Haji Mohamed Dom* v. *Sakiman* [1956] M.L.J. 45.

(2) *Selangor United Rubber Estates Ltd.* v. *Cradock & Ors.* [1965] Ch. 896.

FEDERAL COURT.

G. Sri Ram for the appellant.

Jean Oliveiro (Mrs.) for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): The High Court at Seremban entered judgment in the sum of $13,174.59 against the appellant for the balance on the overdraft account.

The facts reveal that the appellant bought and sold shares using overdraft facilities on the security of the shares deposited with the respondent bank. Things did not fare well for the appellant when the

stock market crashed in the later part of 1973. On January 12, 1974 the respondent demanded payment. The appellant was unable to pay and asked for time hoping that the share value would appreciate. Judging from the correspondence that ensued between the appellant and the respondent it is evident that the appellant was playing for time. Presumably the respondent was also hoping that the appellant would settle the balance outstanding for no action was taken either to sell the shares or to commence legal proceedings to recover the sum owed until some months later. Finally the respondent sold the shares for $46,945.20 leaving a balance of $13,174.59 on the overdraft account.

In the court below one of the questions raised by the appellant was that there was an oral agreement between him and the respondent requiring the respondent to sell the shares when their value dropped to $98,000. The learned judge found as a fact that there was no such agreement and there was therefore no breach of contract as alleged by the appellant. This finding of the learned judge is not contested in this appeal. The appellant's case is that, in substance, the learned judge had failed to consider the defence and had erred in law in treating the case as a simple claim for balance of overdraft. It is the appellant's contention that the manager of the respondent bank who purchased the shares was acting as the agent of the bank and the appellant. There was therefore the question of pledge and duty of the bailee that called for determination by the court. It is submitted that the bailee or 'pawnee', namely the respondent was under a duty to ensure that the sale of shares was a provident one. Reliance is placed upon sections 125 to 129 of our Contract Act, 1950. It is further submitted that as this question was not considered by the learned judge, the appeal should therefore allowed and a retrial ordered.

First and foremost the question that must necessarily be considered is whether the question raised by the appellant was an issue disclosed by the pleadings. It is a cardinal principle of law that a judge is bound to decide a case on the issues on the record. (See *Hj. Mohd. Dom* v. *Sakiman*[1]).

The question therefore is whether the appellant specifically and distinctly pleaded in his statement of defence the point which he now desires to raise.

The relevant paragraph of the statement of defence relied upon by the appellant is paragraph 9 which is reproduced hereunder for easy reference —

"9. The plaintiffs are guilty of negligence and breach of their duty to the defence.

PARTICULARS OF PLAINTIFFS' NEGLIGENCE AND BREACH OF DUTY

(i) They failed to sell the said shares when their value dropped to $98,000.

(ii) They failed to sell the said shares when instructed to do so in April, 1974.

(iii) They grossly and unreasonably delayed the selling of the said shares.

(iv) They failed to take any or sufficient care in the handling of the said shares.

(v) They failed to take any or sufficient steps to protect the interest of the defendant."

It was pointed out by Mrs. Oliveiro, counsel for the respondent that the question of pledge was not pleaded and it is raised for the first time in this appeal.

In consideration of the language used in paragraph 9 and to describe the particulars of negligence and breach of duty we form the view that on a fair construction the reference to the respondent's negligence was clearly in relation to the allegations contained in paragraphs 5 to 8 of the statement of defence and that the particulars in (i), (ii), (iii) and (iv), in paragraph 9 are nothing more than repetitions of the earlier allegations.

There is clearly no specific or distinct allegation made in the statement of defence on the question of agency or of pawnor and pawnee. Nowhere too is it alleged that the manager of the respondent bank was engaged in the share purchase transaction either as agent of the respondent bank or of the appellant and in that capacity had breached his duty.

In *Selangor United Rubber Estates Ltd.* v. *Cradock & Ors.*[2] it was held that "where a plaintiff alleged a breach of duty arising from any given relationship, he had to specify with precision the relation under which that duty arose."

This was an action brought by a company against nine defendants including the applicant bank where the plaintiff alleged, *inter alia,* negligence against the bank as banker.

In the instant case we find no issue on record before the learned judge on the question raised in the appeal upon which he had to adjudicate. In our view the learned judge properly decided the case on the issues disclosed by the pleadings. This appeal must necessarily fail and it is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *Sri Ram & Co.; Lee Boon Peng & Co.*

KOW AH DEK & ANOR. v. K. RATNASINGAM

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.) January 13 & February 21, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 165 of 1979]

Tort — Negligence — Road accident — Brain injury — Damages — Quantum — Damages for pain and suffering and loss of amenities — Damages for loss of future earnings.

Damages — Brain injury — Minimal — Pain and suffering — Loss of amenities.

In this case the respondent was injured in a road accident and suffered minimal brain damage. He was awarded damages of $70,000 for pain and suffering and loss of amenities of life, $112,722.80 for loss of future earnings before retirement and $60,908 for loss of future earnings after retirement. The appellant appealed against the quantum of damages.

Held: (1) although the award for pain and suffering and loss of amenities of life was on the higher side, it was not shown that the learned judge had wrongly used his discretion in arriving at the figure and therefore the award would be confirmed;